

YUNG KONG CO BHD

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v.

**HHH TYRE RETREADING SDN BHD
& ANOTHER CASE**

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HIGH COURT SABAH & SARAWAK, KUCHING

DAVID WONG DAK WAH J

[CIVIL SUITS NOS: 22-123-2002-III(I) &

22-75-2004-III(II)]

3 APRIL 2009

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CIVIL PROCEDURE: *Pleadings - Facts not pleaded - Claim for fire damage - Whether failure to plead subrogation fatal*

EVIDENCE: *Presumption - Adverse inference - Evidence Act 1950, s. 114(g) - Failure by plaintiff to produce witness - Whether presumption of adverse inference to be invoked - Allegation by defendant that welding works conducted by contractor has caused fire - Denial by contractor that welding works were conducted on day of fire - Contractor's workers present on day of fire not called as witnesses - Adverse inference drawn against contractor*

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TORT: *Negligence - Res ipsa loquitur - Application of maxim - Whether prima facie case of negligence proved - Whether onus of proof shifted to defendant*

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TORT: *Rule in Rylands v. Fletcher - Escape of fire sparks to adjoining building causing fire - Whether welding works a non natural use of land - Sparks from welding works on plaintiff's land escaped to defendant's premises - Whether plaintiff responsible for damages caused - Duty of care to ensure that welding works did not cause any damage*

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The business premises of Yung Kong and HHH Tyre were situated next to each other. Prior to 8 April 2002, Yung Kong had engaged a contractor to carry out some construction works. On 8 April 2002, a fire broke out at HHH Tyre's premises and spread to Yung Kong's premises causing damages to Yung Kong as well HHH Tyre. The contractor in performing his construction work had used welding machine which had caused splatters or sparks to fall into HHH Tyre's premises. However, Yung Kong and the contractor claimed no welding works were done on 8 August 2002. In the first suit, Yung Kong claimed against HHH Tyre for damages and HHH Tyre counterclaimed against Yung Kong for damages caused by Yung Kong's contractor. In the

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- A second suit Yung Kong sued the contractor for indemnity of damages if the court found that the cause of the fire was solely due to the fault of the contractor. The issue for the court was to determine who had caused the fire at the premises of HHH Tyre. Counsel for Yung Kong submitted that since it was undisputed that the fire started at HHH Tyre's premises the burden shifted to HHH Tyre to prove that it was not responsible for the fire. HHH Tyre raised a preliminary objection on the issue whether Yung Kong could maintain its action when it had not pleaded it had subrogated its rights to its insurance company as its loss of RM46,868.79 had been compensated. This issue arose from an admission by Yung Kong's general manager that Yung Kong's insurer had compensated its loss of RM46,868.79. It was also submitted that the court should draw adverse inference against Yung Kong and contractor under s. 114(g) of the Evidence Act as no witness was called by the contractor's side to contradict the evidence of HHH Tyre's witnesses.

Held (dismissing Yung Kong's claims against HHH Tyre, allowing HHH Tyre's counter-claim and allowing the claim against the contractor):

- (1) The preliminary issue raised by counsel for HHH Tyre was dismissed based on the decision in *Kementerian Pertahanan Malaysia & Anor v. Malaysia International Shipping Corporation Bhd.* (paras 5 & 8)
- (2) Yung Kong had not proved a *prima facie* case. The fact that the fire started at HHH Tyre's premises was not enough proof of *prima facie* in the circumstance of the case. This is because it was also undisputed that there had been welding works on the side of Yung Kong which may have caused the fire. The burden of proof had not shifted to HHH Tyre. The same applied to the contractor who bore the burden of proving that HHH Tyre had been negligent in causing the fire. (para 23)
- (3) The crucial issue of fact was the cause of the fire which directly related to whether or not there was welding works being conducted on the day of the incident. The only evidence in court on the assertion that no welding work was conducted on that day was from PW1 and PW3 who could not be considered as personnel under the control of the contractor. PW1 had testified that the workers from the

contractor were present on that day at the premises of Yung Kong. Common sense demanded that adverse inference be drawn against the contractor and Yung Kong for not calling the contractor or his workers to testify. Their non appearance as witnesses would be the strongest possible circumstance to discredit the truth of their cases. (para 24)

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- (4) The fire was caused by the negligence of the contractor in failing to ensure that the welding works were conducted in a safe manner. Therefore, Yung Kong was liable for the counter claim by HHH Tyre based on the principle of law established in the case of *Rylands and Fletcher*. The welding works on Yung Kong's premises could only be considered as 'a non natural use' of the land and when the sparks from the welding works escaped from Yung Kong's premises, Yung Kong had to be held responsible for any damages caused to HHH Tyre. (paras 25 & 26)

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- (5) The contractor had a duty of care to ensure that his welding works did not cause any damage. Since the cause of the fire was from the welding works, the contractor was liable for the damages suffered by Yung Kong. (para 27)

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Case(s) referred to:

Dato' Abdullah Hishan v. Sharma Kumari Shukla (No 3) [2001] 5 CLJ 400
HC (*refd*)

Gurbakhsh v. Gurdial [1927] PC 230 (*refd*)

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Kementerian Pertahanan Malaysia & Anor v. Malaysia International Shipping Corporation Bhd [2003] 2 CLJ 520 HC (*refd*)

Kementerian Pertahanan Malaysia & Anor v. Malaysia International Shipping Corporation Bhd [2007] 4 CLJ 820 CA (*refd*)

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA (*refd*)
Lin Lin Shipping Sdn Bhd v. Govindasamy Mahalingam [1993] 3 CLJ 160
HC (*refd*)

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Muniandy & Ors v. PP [1966] 1 MLJ 257 (*refd*)

New Chew v. KBC Sawmill Sdn Bhd & Anor & Another Case [1998] 1 CLJ Supp 16 HC (*refd*)

PP v. Muhamed Sulaiman [1982] 2 MLJ 320 (*refd*)

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Rothmans of Pall Mall (M) Bhd v. Neo Rim Har & Anor [1988] 3 MLJ 478 (*refd*)

Rylands and Fletcher [1886] LR 1 Ex 265 (*refd*)

Sim Ah Oh v. PP [1962] 28 MLJ 42 (*refd*)

Sim Ah Song & Anor v. Rex [1951] 17 MLJ 150 (*refd*)

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- A** *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd [1998] 1 CLJ Supp 147 HC (refd)*
Teoh Guat Looi v. Ng Hong Guan [1998] 4 CLJ 416 CA (refd)
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 (refd)
- B** **Legislation referred to:**
Evidence Act 1950, s. 114(g)
- Other source(s) referred to:**
Clerk & Lindsell, *Torts*, 19th edn, pp 1235-1236
- C** *(Civil Suit No: 22-123-2002-III(I))*
For the plaintiff - Anthony Bong (Tony Ling with him); M/s Satem, Chai & Dominic Lai Advocates
For the defendant - Cheng Hui Hong; M/s Cheng & Cheng Associates
- D** *(Civil Suit No: 22-75-2004-III(II))*
For the plaintiff - Anthony Bong (Tony Ling with him); M/s Satem, Chai & Dominic Lai Advocates
For the 2nd defendant - John Shek (Sandra Shek with him); M/s John Shek & Co Advocates
- Reported by Amutha Suppayah*
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JUDGMENT

- F** **David Wong Dak Wah J:**
- Proceedings**
- G** [1] This trial concerns two suits which had been consolidated by the court. The suits are 22-123-2002-III(I) (the first suit) and 22-75-2004-III(I) (the second suit). In the first suit, the plaintiff (Yung Kong) is claiming for damages incurred as a result of fire emanating from the grinding room of the defendant (HHH Tyre). HHH Tyre denies liability on the ground that it was Yung Kong's
- H** contractor who caused the fire. The contractor is the defendant in the second suit (contractor). HHH Tyre is also counterclaiming against Yung Kong for damages caused by the Yung Kong's contractor.
- I** [2] In the second suit Yung Kong sues the contractor for indemnity of damages if the court finds that the cause of the fire was solely due to the fault of the contractor.

Background Facts

[3] The business premises of Yung Kong and HHH Tyre are situated next to each other at Abell Road, Padungan, Kuching. Prior to 8 April 2002, Yung Kong had engaged the contractor to carry out construction of an upper floor extension with roof. On 8 April 2002, a fire broke out at the grinding room at HHH Tyre's premises and it spread to Yung Kong's premises causing damages to Yung Kong as well HHH Tyre resulting in a counterclaim against Yung Kong. It is not disputed that the contractor in performing his construction work had used welding machine which had caused splatters or sparks to fall into HHH Tyre's premises. However, what is disputed by Yung Kong and the contractor is that there was no welding works done by the contractor on 8 April 2002.

Issues

[4] From the evidence and the submissions made by counsels, it is my view that the following issues require my deliberation.

1. Whether Yung Kong can maintain its action when it had not pleaded it had subrogated its rights to its insurance company as its loss of RM46,868.79 had been compensated?
2. Who caused the fire at the premises of HHH Tyre?

Issue No. 1: Whether Yung Kong Can Maintain Its Action When It Had Not Pledaded It Had Subrogated Its Rights To Its Insurance Company As Its Loss Of RM46,868.79 Had Been Compensated?

[5] This issue arose from an admission by PW1 (Yung Kong's general manager) during cross examination that MNI, Yung Kong's insurer, had compensated its loss of RM46,868.79. From this it was submitted that as this was not pleaded Yung Kong cannot maintain its action and referred the court to the case of *Kementerian Pertahanan Malaysia & Anor v. Malaysia International Shipping Corporation Bhd* [2003] 2 CLJ 520 whereby the High Court at pp. 520-521 held that:

It is common ground that the plaintiffs' suit was wholly based on the principle of subrogation but this point was not pleaded nor were there any particulars pertaining to subrogation adverted in the statement of claim, and there was no evidence to prove that

- A the firm had been duly appointed by the Attorney-General's Chambers to act for the second plaintiff. Thus, where a solicitor has not shown any authority to act for the party he purports to act, the suit filed by him must be struck out.
- B [6] Whether this is a deliberate act of trying to mislead the court or just shabby preparation I leave it to the counsels to ponder. I also take this opportunity to remind counsels that the primary role of a counsel is to assist the court and not to mislead or confuse it. The just quoted High Court's decision had been overruled by
- C the Court of Appeal on 13 June 2007 and the judgment is reported in *Kementerian Pertahanan Malaysia & Anor v. Malaysia International Shipping Corporation Bhd* [2007] 4 CLJ 820 where Zaleha Zahari JCA on behalf of the panel held as follows (p. 831):
- D On the issue of subrogation not being pleaded, it is appropriate to reiterate the function of pleadings is to give notice of the case which has to be met by the opposing party. The purpose of particulars is to define the issues and to indicate to the opposing party how much range of his possible evidence will be relevant to meet those issues. In the circumstance of the present case the
- E appellants need only state in summary form facts which they are relying on for the purpose of formulating a complete cause of action against the respondents, ie, the alleged negligent acts of the respondent and/or their agents resulting in loss and damage. In our considered opinion there is no necessity to plead the doctrine of subrogation and particulars giving rise to the same.
- F [7] In the case of *Lin Lin Shipping Sdn Bhd v. Govindasamy Mahalingam* [1993] 3 CLJ 160, Richard Malanjum JC (as he then was) quoted with approval the view of Gunn Chit Tuan J in the case of *Rothmans of Pall Mall (M) Bhd. v. Neo Rim Har & Anor.*
- G [1988] 3 MLJ 478 at p. 484 I (left), A to E (right) where he said as follows:
- H After plaintiff's counsel has made his speech in reply, Mr Ponniah sought leave to address the court on two matters. He stated briefly that subrogation had not been pleaded and there was no evidence of it; but when asked by the court, counsel was not able to quote any authority to show that subrogation must be pleaded. Counsel also stated briefly that the *Port Swettenham Authority's* case [1978] 2 MLJ 137 could not be relied on because the duty of care there was lower than in this case.
- I Be that as it may, the doctrine of subrogation has been explained as follows in 16 *Halsbury's Laws of England*, 4th Ed, at p 969:

Where one person has a claim against another, in certain circumstances a third person is allowed to have the benefit of the claim and the remedy for enforcing it, even though it has not been assigned to him, and he is then said to be subrogated to the rights of the first person.

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In this case there was no evidence that the benefit of the claim has been assigned so that the insurance company could sue the defendants in its own name: see *The London Assurance Company v. Sainsbury & Anor.* (99 ER 636). But even in the absence of a formal assignment, as there was evidence that the insurance company concerned had paid under the insurance policy it was entitled to the benefit of all rights possessed by the assured, i.e. the plaintiff in respect of the loss insured against (*Castellain v. Preston* [1883] 11 QBD 380). It was entitled to enforce the right of action in the plaintiff's name against the defendants who have caused the loss (*King v. Victoria Insurance Co. Ltd.* [1896] AC 250).

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[8] Accordingly I dismiss the preliminary issue raised by counsel for HHH Tyre.

Issue No. 2: Who Caused The Fire At The Premises Of HHH Tyre?

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[9] This issue can be dealt with by evaluating the conflicting evidences of PW2 (Karnail Singh Khaira, retired Dy. Director of Jabatan Bomba, Kuching) and DW7 (Mr. Barry Dillon of Forensic Services (M) Sdn Bhd, appointed by Insurers) in the light of other evidences. This, in my view, will determine the result of this suit. From the evidence adduced in the trial, the crucial issue of fact is whether the fire was caused by sparks emanating from the welding works conducted by the contractor on the premises of Yung Kong. From Yung Kong's side it called PW2 as its expert to say that the fire was most probably not caused by the sparks. HHH Tyre called DW7 as its expert to contradict PW2's evidence.

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[10] When the court treats a witness as an expert, it must ensure that he or she complies with certain requirements which in the words of Suffian LP in *PP v. Muhamed bin Sulaiman* [1982] 2 MLJ 320 at 332 are as follows:

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As to the question whether or not Mr. Lum is an expert, it is true that this is a preliminary question to be determined, but it is a question upon which, in practice, considerable laxity prevails. This is because while the expert must be "skilled", he need not

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A be so by special study, he may be so by experience; and the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility.

B In *The Queen v. Silverlock* [1894] 2 QB 766, identity of handwriting was in question and a solicitor was called to give evidence on it, and Lord Russell CJ said at page 771:

C It is true that the witness who is called upon to give evidence founded on a comparison of handwritings must be peritus; he must be skilled in doing so; but we cannot say that he must become peritus in the way of his business or in any definite way. The question is, is he peritus? Is he skilled? Has he an adequate knowledge?

Phipson on Evidence, 11th edition, says in paragraph 1285:

D The competency of the expert is a preliminary question for the judge and is one upon which, in practice considerable laxity prevails. Though the expert must be 'skilled', by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility.

E and the learned author cites *Silverlock* [1894] 2 QB 766 as his authority for the above proposition.

F At the bottom of page 511 the learned author after saying that the opinions of medical men are admissible upon questions within their own province, remarked that even the evidence of unqualified medical practitioners, hospital students and dressers is admissible in appropriate circumstances.

G [11] To return first to PW2 who in his testimony (PW2A) said this:

H I was with the Bomba Malaysia for thirty two years. I joined in 1968 and I retired in 2000 as the deputy director of Fire and Rescue Service Sabah. As deputy director, I was assisting the director in all matter relating to operation administration, fire prevention, enforcement and training in the service.

I Throughout my career I have received numerous awards as well as training in matters relating to fire prevention and management. In 1984, I received fire service administration, prevention and training at Fire Service College, Wellington New Zealand. Over the years, I have also attended various fire courses and seminars held in Singapore and Tokyo Japan.

[12] This evidence was not challenged at all by counsel of HHH Tyre and hence applying the test set out by Suffian LP I have no hesitation in treating PW2 as an expert witness. A

[13] As for DW7, his credential as set in annexure A in DW7A is just as impressive. Apart from his many professional qualifications, he had testified in many court cases in Malaysia, Singapore, Australia, Philippines, Taiwan and Thailand. Again based on the particulars set out in annexure A and his vast experience, I have no hesitation in accepting him as an expert in the field of investigating cause of fire. B C

[14] The court is thus faced with the task of having to choose which expert to believe. In discharging this task, I am guided by the following pronouncements:

Adams J in *Sim Ah Oh v. PP* [1962] 28 MLJ 42 at p. 42 held: D

The evidence of the expert must be tested like any other evidence against the facts upon he is disposing. The expert should have been asked by the prosecutor to elaborate and give his reasons as to why he said these odd pieces of paper were in fact documents relating to public lottery, and the learned President should have considered these reasons before he came to his finding. E

Brown Ag. CJ in *Sim Ah Song & Anor v. Rex* [1951] 17 MLJ 150 at p. 151 said: F

The responsibility for the determination of this question, as in the case of every question upon which expert evidence is called, rested upon the Court and not upon the expert. The business of an expert witness is to draw upon the store of his knowledge and experience in order to explain some matter which his experience should qualify him to understand. He is quite entitled to express his opinion, which indeed is the natural corollary of his explanation. But a bare expression of his opinion has no evidential value at all. Unless he gives an explanation which supplies the understanding of the subject which the Court lacks, the Court is in no better position than it was before to determine the question which it is its duty to determine, and if the Court acts upon a bare expression of the expert's opinion the determination of the question becomes that of the expert and not of the Court. G H

[15] I also take heed of what was stated in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 by Gopal Sri Ram JCA at p. 25: I

- A A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must also test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.
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- [16] In *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229, the trial judge had found the plaintiff in that case guilty of fraudulent misrepresentation based on the veracity of the defendant and its witnesses. On appeal, the Federal Court reversed his finding of fraud. Chang Min Tat FJ said:
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- Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. **Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case.** Plausibility should never be mistaken for veracity. (emphasis added)
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- [17] In *Muniandy & Ors v. Public Prosecutor* [1966] 1 MLJ 257, the trial judge accepted the evidence of certain witnesses because they had remained unshaken in cross examination. Based on that evidence he convicted the appellant. The Federal Court reversed the decision. Ong Hock Thye FJ said:
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In the instant case, it is stated by the learned trial judge as the ground for his belief in the main prosecution witnesses, that they had been unshaken in cross-examination. In our view, being unshaken in cross examination is not per se an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration. The fact that the trial judge believed implicitly in the truthfulness of Nagarachnam and Ramasamy does not preclude closer scrutiny of their evidence and this we have done.

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[18] With the above guidance I shall now look at the conflicting evidence of the two experts.

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PW2's Evidence

[19] His evidence is quite straightforward in so far as the cause of the fire was concerned. This was what he testified:

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It is difficult to pin point or ascertain the true cause of the fire but I do not think that the welding spark spatter was the cause of the fire. For the welding spark spatter to get into the grinding room, the workers had to be carrying out welding work near to the grinding room. The evidence that I gathered did not support such a suggestion including the fact that on that day of fire, the welding gun was found hanging in the middle of the roof truss some forty feet away from the epicenter of the fire. It would not be possible for the spark to travel such a distance. Even if we assume that the welders were working close to the grinding room, it would still be difficult for the spark to penetrate the eaves under the roof to get into the grinding room.

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I would not rule out the possibility of other causes because of the following:

1. I strongly believed that there is no approved building plan of the grinding room and nobody is exactly sure of the specifications as to the size, height, etc.
2. No independent third party eye witnesses as to how the fire started.
3. That the defendant (HHH Tyre) has complete control as to who can access to the grinding room.

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[20] His evidence was from his observation made on the day of the fire and after the fire had been put out by the Fire Department.

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A DW7's Evidence

[21] From his report – exh. D14, he made the following observations and conclusion:

B 6. The cause of the fire

The following possible causes were considered by DW7:

6.1 Deliberate

C The fire occurred during working hours. There was no indication the business was anything other than successful. At the time of the fire the people with shares in the business were at the front of the premises, well away from where the fire started. Only one person used the room where the fire started and he had worked with the company for 27 years. The door to the room was latched and could be seen by anyone located along the passageway that extended all the way to the front of the premises. There was a possible accidental cause of the fire and therefore deliberate ignition was not in any way inferred. There was no evidence, either physical or circumstantial, to suggest the fire was deliberate.

E 6.2Smoking

F The dominant material in the room was the material produced by the abrasion of tyres. Although this material will burn, it will not support smoldering combustion. This was obvious at the site, and I collected a sample and later carried out an experiment that showed that smoldering could not occur. None of the other materials in the room would support smoldering combustion. Therefore it was not possible for the fire to have been caused by discarded smoker's material.

G 6.3Electrical

H There were a number of electrically operated devices in the room. They were either in the centre or to the right. This was confirmed by digging out the left and centre of the room. Examination of these devices did not reveal any indication of an electrical event. The digging revealed there was no electrical wiring left of the centre of the room. That is, within two metres of the wall where the fire was seen to have started. Therefore electrical ignition could be eliminated as a cause of the fire.

I Ignoring the eyewitness evidence, I could not exclude electrical ignition in the grinding room. The machines were switched off and there was no evidence of electrical malfunction, but the severe damage meant that it was theoretically possible for there to have

been an electrical event. However all the wiring was in the right half of the room and it did not make sense for the fire to have been electrical in origin when all the witnesses had described the fire as being on the extreme left of the room. Therefore, the fire could not have been electrical in origin.

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6.4 Abrading

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Consideration was given to the abrading process and whether it could have initiated a fire. The unwanted rubber was removed from the used tyres with toothed blades. Since this process continually 'attacked' fresh rubber and particles were continually produced, there was no mechanism by which heat could build up. Furthermore, the room had been last used two days before the fire. As explained above, the rubber compound was incapable of sustaining a smoldering fire. Thus it was not possible for the fire to have been initiated two days before and to have smouldered and later burst into flames.

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6.5 External Fire

As described above, in terms of the HHH business alone, all accidental causes of fire could be eliminated and deliberate ignition seemed highly unlikely. Therefore, it was implied that the ignition source came from outside the HHH premises.

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The fire started at the rear left corner of HHH and in theory the fire could have originated from Yung Kong on the left or the premises behind. The latter was an old sawmill used for storage and as far as is known there were no people stationed there. The material stored there, at least adjacent to HHH, was polystyrene waste. This does not support smouldering combustion and hence a cigarette thrown from the HHH or the Yung Kong could not have started a fire.

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When polystyrene burns, copious quantities of black smoke are produced. Therefore if a fire had begun in the premises behind, it would be immediately apparent. The HHH witnesses whom I interviewed were adamant that when the fire started, it was confined to their premises, specifically the wall common with Yung Kong. The contractor's worker on the roof of Yung Kong would have been in a particularly good position to see any fire at its beginning. When he raised the alarm, the fire was already in the grinding room, which was separated from the premises behind by a steel sheet.

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- A On the Yung Kong side of the common wall there was a gap of at least a metre to bags of cement on pallets. These were neatly arranged and housekeeping was good. There was no reason to suspect that a fire had started on the Yung Kong side of the common wall. Again, the contractor's worker on the roof would be expected to be quickly aware of a fire beneath him.
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6.6 Ignition By Hot Work

- C The fire was not accidentally or deliberately started from within HHH. Neither could it have been the result of spread from an external fire. Therefore the fire had to have been started by an externally introduced ignition source. Ignition from hot work was the only possible cause of the fire.

- D When welding takes place, there is inevitably the release of weld spatter. This appears to the onlooker as sparks. The sparks consist of burning (oxidizing) balls of molten iron/slag. Their appearance is very characteristic and their existence is proof that welding or oxyacetylene cutting has taken place. The separating structure at the boundary common to HHH and the Yung Kong was truly a common wall, with a succession of contributions from both parties over the years. It was sturdy at the lower half but less so up high. At the front it remained unburnt, allowing examination. It could be seen that while most rain would have been kept out of both premises, it was possible for sparks to pass under the eave into the HHH premises. Examination confirmed that sparks had entered the HHH premises.
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- F If sparks could so readily enter, it remained to explain why the contractors were able to carry out welding the length of the boundary, but only started a fire towards the end of the welding, where they were working last. Along the boundary, with the exception of the grinding room, HHH stored tyres. It is difficult to start a fire at a tyre, even with a flaming match. I doubt that welding sparks could start a fire in this way. However, the material produced by the abrading process was very fine, as shown in Photograph 33 and I believe that a spark falling onto this material could start a fire.
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6.7 Likely Cause of the Fire

There was therefore very strong evidence that welding was the cause of the fire, summarized as follows:

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1. Elimination of other possible causes of the fire.
 2. The remains of welding equipment.

3. The 'welding end' of the welding cable draped over the steel structure close to where the fire was discovered. A
4. The presence of a worker on the roof of Yung Kong at the time of the fire and discovery of the fire by him.
5. Physical and eyewitness evidence of welding sparks having entered the HHH. B
6. The presence of fine particles of a combustible material that could be ignited by a spark, at the location where the fire was first seen. C

[22] Before I express my view on the two conflicting reports, I should say a few words on Mr. Tony Ling's (counsel for Yung Kong) submission that since it is undisputed that the fire started in the grinding room of HHH Tyre the burden then shifts to HHH Tyre to prove that it is not responsible for the fire. For this submission, he relied on the case of *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ Supp 147. Mr. Ling also relied on the allegation that the HHH Tyre grinding room did not comply with safety requirements and had breached s. 118(1)(d) of the Building By-Laws of Building Ordinance 1994. Though Mr. Ling did not expressly say it, he is, in my view, relying on the principle of *res ipsa loquitor* which is explained by NH Chan JCA in *Teoh Guat Looi v. Ng Hong Guan* [1998] 4 CLJ 416 as follows:

... *res ipsa loquitor* was in essence no more than a common sense approach to the effect of the evidence in certain circumstances. It means that a plaintiff *prima facie* establishes negligence where (i) it is not possible for him to prove precisely how the accident happened but (ii) on the evidence as it stands, he manages to show that the accident could not have happened without the negligence on the part of the defendant. F
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[23] From the evidence can the court say that Yung Kong has proved a *prima facie* case? In my view Yung Kong has not done so. The fact that the fire started at HHH Tyre grinding room is not enough proof of *prima facie* in the circumstance of this case. I say that for the simple reason that it is also undisputed that there had been welding works on the side of Yung Kong which may have caused the fire. Of course if there was no welding works, Mr. Ling would have been justified to rely on the principle of *res ipsa loquitor*. Accordingly I find that the burden of proof had not shifted to HHH Tyre and the same applies to the case of the contractor and that is to say they bear the burden of proof, ie, of proving that HHH Tyre had been negligent in causing the fire. H
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- A [24] I now return to my evaluation of the two experts' evidence and after due consideration by using the guidelines set out earlier, I am of the view that the evidence of DW7 is more credible and my reasons are as follows:
- B i. It had been corroborated by the undisputed fact that there was welding works carried out in the premises of Yung Kong before the day of the fire incident – 8 April 2002. The assertion of Yung Kong that the welding works had finished on 4 April 2008 is not reasonable in view of the presence of the welding set on the roof of Yung Kong premises. Furthermore there was no explanation regarding the presence of the welding set on the day of the fire by PW1 and the contractor, a defendant in the second suit. The presence of the welding set is confirmed by DW2 and DW6 whose evidence I have not been given any reason to doubt.
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- E ii. It is also not disputed that after complaints by HHH Tyre of the welding sparks going into its premises, the contractor had taken steps by using metal sheets to shield welding sparks from going over to the premises of HHH Tyre. (see the evidence of PW1-Q6 in PW1-A).
- F iii. There was evidence from DW4 and DW5 that on the day of the fire they heard the workers of the contractor running along the roof of Yung Kong premises yelling out 'fire' 'fire'. Those workers had also run away from the scene of the incident instead of helping to put out the fire. I am mindful of the fact that DW4 is still an employee of HHH Tyre when testifying in court but that is not the case of DW5 who is an ex employee of HHH Tyre. He has no motive to lie in court and his evidence corroborates the evidence of DW4.
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- H iv. No witness was called by the contractor's side to contradict the evidence of DW4 and DW5. Not only that there was no reason given to the court as to why they did not call any witness to rebut the evidence of DW4 and DW5. Naturally Mr. Cheng submits that the court should draw adverse inference against Yung Kong and contractor under s. 114(g) of the Evidence Act. As to how this section is applied can be gathered from the very instructive words of Kamalanathan Ratnam J in *Dato' Abdullah Hishan v. Sharma Kumari Shukla* (No. 3) [2001] 5 CLJ 400:
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Failure of the defendant to testify

Both counsel concede that their research confirms that there is no local precedent where a party, not a witness to a case, has refused to testify. It is my view that having given every indication that the claim would be resisted to the hilt, and having denied in the defence that she had agreed to convert to Islam and marry the plaintiff in return for the promised loan of RM262,350, the defendant would have been the first witness for the defence. I had earlier made a ruling that the defendant ought not to be allowed to call other witnesses first. The said ruling is based on simple logic. The defendant, the main proponent to the litigation, must herself rebut the plaintiff's allegations. Other evidence can corroborate her testimony. Further if the defendant is allowed to sit in and listen to the evidence of other witnesses, there can always arise the insinuation when the defendant decides to testify, that she is tailoring her evidence to suit the evidence already given, since she was present in court to hear the evidence. But in this case that was not what happened; the defendant elected not to testify and instead called other witnesses. Mr Karpal Singh for the plaintiff urged me to invoke s. 114 of the Evidence Act 1950 against the defendant. In relation to s. 114, Sarkar states in his *Law of Evidence* (1998 Ed) at p 1686 that 'presumptions are necessarily made against parties who have knowledge of the facts in dispute [and] will not subject themselves to examination when a *prima facie* case is made against them, and when by their own evidence, they might have answered it'. It is my judgment that since all these material facts have been alleged against the defendant and which facts are personal to, and within the knowledge of the defendant, and when the defendant as in this case refuses to take the witness stand without any plausible reason, an adverse inference must be drawn against her. Mr Gurbachan Singh argued that she has a right in law not to testify. Whilst I agree that there is no compulsion, I must hasten to add that the defendant must be prepared to face the consequences of an adverse inference being drawn against her for her failure to testify. To my mind it is the bounden duty of the defendant, acquainted thoroughly with the facts of the case, as she is, to testify on her own behalf and failure to do so would clearly go to discredit the truth of her case and to establish the truth of the plaintiff's case. Whilst there is no rule of law that the defendant must let herself be examined as a witness in order to establish her case, this court will

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- A be perfectly justified in rejecting the averments in her defence unless there is other persuasive evidence in support of her case. In so far as the defendant was concerned she let her husband testify on her behalf. His evidence, particularly relating to matters in issue, were so peppered with hearsay evidence that almost all such evidence relating to matters in issue had to be rejected. He was never present during any of the conversations between the plaintiff and the defendant and what he told the court was what was told to him by his wife, the defendant, and by her deliberate act of refusing to testify, such evidence is pure hearsay. The defendant in my view attempted to avoid the crucial test of the law and practice relating to justice, that is, to subject herself to the acid test of cross-examination. Forged on the anvil of truth, the evidence that thus emanates is sheathed with the respectability that only cross-examination can bestow. The defendant failed to go through the ritualistic baptism of fire to emerge pure and serene. To my mind, like the fact that lay before her she sullied herself by her dismal failure to stand the test of cross-examination.
- E As stated earlier by me, the crucial issue of fact is the cause of the fire which directly relates to whether or not there was welding works being conducted on the day of the incident. The only evidence in court on the assertion that no welding work was conducted on that day was from PW1 and PW3 who cannot be considered as personnel under the control of the contractor. PW1 had testified that the workers from the contractor were present on that day at the premises of Yung Kong. Why were these workers and the contractor not called as witness to rebut the evidence of DW4 and DW5 or to corroborate the evidence of PW1 and PW3 is puzzling to say the least. Applying the instructive words of his Lordship in *Dato' Abdullah Hishan v. Sharma Kumari Shukla (No. 3) (supra)* to the facts in this case, common sense in my view demands me to draw adverse inference against the contractor and Yung Kong for not calling the contractor or his workers to testify.
- H Their non appearance as witnesses would be the strongest possible circumstance to discredit the truth of their cases (*Gurbakhsh v. Gurdial* [1927] PC 230). Even if I am wrong in making an adverse inference against Yung Kong and the contractor, it is my view that there are other evidence strong enough to conclude that the fire was on the balance of probability caused by the welding works of the contractor.
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- v. There is evidence from DW4 that the grinding room was not operating at the material time. A
- vi. There is evidence from DW6 who was the fire station officer who attended the fire and had concluded after due investigation that the fire was caused by the sparks from welding works. His department's report as contained in pp. 72-75 of exh. D11A must be given due weight as he is what I call a disinterested witness or a witness with no motive. His evidence corroborates the evidence of DW7. Mr. Ling however attacks the report in that it was not signed by DW6. This is of no significance as he had on the day of the incident conducted an investigation and had come to a conclusion which is the similar to that as in D11A. B
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- vii. From the photographs tendered in court, it is reasonable to conclude that the welding works had not been completed. This is supported by the presence of the welding tools on the roof of Yung Kong premises. D
- viii. PW2, though was present on the day of the fire, did not take full advantage of his presence by preparing a more detailed report. Firstly, no photograph was taken by him of the conditions of the site. Secondly, no interview was conducted on the workers of the contractor or HHH Tyre. Thirdly, no attempt was made by him to discuss with the Fire Department as to how the Fire Department came to the conclusion that the fire was started by the welding works sparks. Fourthly, there was no study made by him as to whether the fire could have started by spontaneous combustion from materials within the grinding room. Fifthly, his evidence on the non compliance of the grinding room to Building By-Law is neither here nor there as it does give any clue as to the cause of the fire. In any event Mr. Tony Ling did not call any evidence from the relevant council to confirm what PW2 had testified. E
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- ix. DW7's evidence on the contrary is full in details and as pointed out above is corroborated by the evidence of other witnesses and the surrounding circumstances. He had also came to the conclusion that there was no evidence that the fire could have been started by smouldering combustion. This conclusion is important as it is Yung Kong's contention that H
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- A the fire started from within the grinding room. There was also a finding that it was not an electrical fault which could have started the fire. No such investigation was conducted by PW2 on those aspects.
- B x. The fact that the welding gun was found 40 feet from the grinding room can be explained by the fact that during the operation to put out the fire which was considered big the welding gun could have been moved.
- C xi. The photographs tendered show conclusively that the welding works started from the front to the back of Yung Kong premises.
- xii. The soft attempt by Mr. John Shek (counsel for defendant in 2nd Suit) to imply that the fire may have been deliberately caused by HHH Tyre by relying on the fact that its insurance was taken out only a week before the fire is without merit. It is inconceivable that MAA would pay out such a claim if there was such deliberate act by HHH Tyre. In any event there was no direct evidence being led by anyone to prove this allegation.
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[25] Accordingly I find that the fire was caused by the negligence of the contractor in failing to ensure that the welding works were conducted in a safe manner. This being the case I hold that Yung Kong is liable for the counter claim by HHH Tyre based on the principle of law established in the case of *Rylands and Fletcher* [1886] LR 1 Ex. 265 as submitted by Mr. Cheng and set out in his submission where he quoted from at pages Clerk & Lindsell on *Torts* (19th edn.) at pp. 1235 to 1236:

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G **Nature of the rule**

In *Rylands v. Fletcher*, Blackburn J said:

H We think that the true rule of law is, that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

I In the House of Lords, Lord Cairns concurred in his judgment, but introduced an element of flexibility by restricting the rule to circumstances where the defendant had made “a non-natural use” of the land. This is “strict liability”, it is thus unnecessary for a claimant to prove negligence in the defendant or his agents.

[26] In the present case, the welding works on the premises of Yung Kong can only be considered as 'a non natural use' of the land and when the sparks from the welding works escaped from Yung Kong's premises, Yung Kong must be held responsible for any damages caused to HHH Tyre. A

[27] As for the second suit, the contractor has a duty of care to ensure that his welding works did not cause any damage and since I have found that the cause of the fire was from the welding works I have no option but to hold the contractor as the defendant in the second suit, liable for the damages suffered by Yung Kong, the plaintiff in the second suit. B
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Damages Claimed

[28] The amount counterclaimed by HHH Tyre is for the sum of RM479,970 (as per para. 13 of the statement of defence and counterclaim) and the details are as follows: D

a. Loss of stocks-in-trade	RM450,000	
b. Forensic Services (M) Sdn Bhd's fees		
– forensic expert report	RM 10,770	E
c. Crawford & Company Adjusters (M) Sdn Bhd		
– adjusters' reports	RM 19,200	F

[29] As for the claims by Yung Kong against the contractor it is for the sum of RM526,838.79 which is made up as follows:

(i) 19 bags of red cement (20kgs)	RM 429.97	
(ii) 108 bags of white cement (20kgs)	RM 1,439.64	G
(iii) 10 bags of green cement (20kgs)	RM 307.60	
(iv) 1823 bags of cement	RM 20,891.58	
(v) Repair of plaintiff's premises	RM 23,800	H

	RM 46,868.79	
plus		
(vi) Claims by HHH Tyre	RM 479,970	I

	RM526,838.79	

A [30] The manner in which Yung Kong and HHH Tyre need to do to succeed in their claims is clearly set out in the case of *New Chew v. KBC Sawmill Sdn Bhd & Anor & Another Case* [1998] 1 CLJ Supp 16 by Richard Malanjum J (as he then was) where at pp. 48-50 he said:

B Besides claiming for the refund of the repayments for the machinery, the plaintiff is also claiming for damages for the loss of the benefit of the said agreement. To begin, I can do no better than to quote what his Lordship Edgar Joseph Jr J (as he then was) has said in *Popular Industries Limited v. Eastern Garment Manufacturing Sdn. Bhd.* [1989] 3 MLJ 360 at p. 307:

C It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see: *Marzetti v. William* 109 ER 842).

D And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example *Dixon v. Deveridge* 172 ER 50; [1825] 2 C&P 109 and *Twyman v. Knowles* 138 ER 1183. On the question of the quality of evidence expected of a plaintiff, it is well to remember what Devlin J said in *Biggin v. Permanite* [1951] 1 KB 422 at page 438, namely, 'where precise evidence is obtainable the court naturally expects to have it, where it is not, the court must do the best it can'. Nevertheless, it remains true to say that generally 'difficulty of proof does not dispense with the necessity of proof' (see *Aerial Advertising Co. v. Batchelors Peas* [1938] 2 All ER 788 at p. 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v. Curtin* [1971] 1 WLR 1731 in which the plaintiff claiming for diminution of profits of his one man-business failed in his claim; even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given. (See para 345b *McGregor on Damages* (15th Edition)).

His Lordship also went on to say thus, at p. 369:

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In this context, I am reminded of Lord Goddard's dictum in *Bonham-Carter v. Hyde Park Hotel* [1948] WN 89 quoted with approval by Thomson CJ in *Lee Sau Kong v. Leow Cheng Chiang* [1960] 1 LNS 56, namely, that:

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Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, 'This is what I have lost, I ask you to give me these damages'. They have to prove it'.

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Meanwhile I am also well-aware that an innocent party in a case of a breach of contract is entitled to compensation for any loss or damage caused to him. And that includes a party who has rightly rescinded a contract. (See: Sections 74 and 76 of Contracts Act, 1950.

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The defendants did not adduce evidence to rebut what was said by the plaintiff. Nor was there any challenge to the testimony by way of contradictory evidence.

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But learned counsel for the defendants submitted that the plaintiff failed to prove his loss and damage. According to him the evidence consisted of conjectures and guess work without any independent evidence adduced. He also said that the plaintiff omitted to produce any record to substantiate his claim.

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Now, it is trite law that the plaintiff is only required to prove his damages on the balance of probabilities. The first consideration therefore is whether he has done so. In coming to a conclusion or finding on this point, I do not think it can be done by way of default, ie, if the other party did not challenge or cross-examine a particular evidence, allegation or claim, then it is to be taken as the truth. In the first place such evidence, allegation or claim must not only be relevant and admissible but also sufficient or has a role to prove the element needed to be established on the standard of proof required under the law of evidence. There is no obligation for the opposite party to challenge a piece of evidence which may have no or very little probative value.

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A [31] I first deal with the damages claimed by HHH Tyre in its counterclaim. In proving damages, Mr. Cheng (counsel for HHH Tyre) relied on the report of DW2 (exh. D10A and D11A), the adjuster from Crawford & Company Adjusters (M) Sdn Bhd, an independent and licensed loss adjuster. DW2 in his evidence-in-chief has explained that HHH Tyre's loss of stocks-in-trade was computed using two methods, namely:

- a. Loss determined by physical inventory exercise; and
- b. Loss determined by stock reconciliation exercise and took into account of salvage value of the some of the damaged stocks-in-trade. The details of how the final amount of RM461,713.96 was arrived at are set out in exhibit D11A. However the claim was set at a lower sum of RM450,000. resulting in a subrogation/discharge voucher (exh. D6) duly executed by DW3 on behalf of HHH Tyre and the payment for the said sum of RM450,000 was made to the HHH Tyre.

[32] As for the claim for the adjusters' fees, the relevant supporting documents in the form of the adjusters' invoice (exh. D7) and the payment voucher and a copy of the said cheque for the sum of RM19,200 were produced as exh. D9. Also in respect of the forensic expert's bill, the relevant supporting documents in the form of the invoice (exh. D8) and the payment voucher together with a copy of the said cheque for the sum of RM10,770 (exh. D15) were produced. Furthermore both DW2 and DW7 confirmed that they had received the payments.

[33] Applying the principle of law set out earlier, I have no doubt in my mind that HHH Tyre has successfully proved its claim on a balance of probability. In my view the fact that MAA, the insurance company who issued the policy to HHH Tyre, has seen it fit to accept DW2's report and pay the amount claimed tantamount to strong *prima facie* evidence that the damages has been proved. I say that for the simple reason that insurance companies by nature would not pay the amount claimed as it is not in their financial interest to do so and they would do so only when they are satisfied that the claim was genuine. Furthermore DW2's report was not challenged by counsels for Yung Kong and the contractor.

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[34] As to the claim by Yung Kong against the contractor for the sum of RM479,970, I allow it as I have allowed the claim by HHH Tyre against Yung Kong. In respect of the sum of RM46,868.79. I also allow it on the ground that MNI the insurance company had paid the amount claimed – see D3 and D4.

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Court's Orders

[35] In respect of the 1st suit I make the following order:

1. The plaintiff's (Yung Kong) claims against the defendant (HHH Tyre) is dismissed with costs to be taxed unless agreed to the defendant.
2. In respect of the counterclaim by the defendant, judgment against the plaintiff in the sum of RM479,970 together with costs to be taxed unless agreed to the defendant and interest at 4% p.a. to be calculated from 8 April 2002 until the date of this judgment and thereafter at 8% p.a. till the full payment of the judgment sum.

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[36] In respect of the second suit, I make the following order:

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1. Judgment against the defendant (contractor) in the sum of RM526,838.79 together with costs to be taxed unless agreed to the plaintiff (Yung Kong) and interest at 4% p.a. to be calculated from 8 April 2002 until the date of judgment and thereafter at 8% p.a. from the date of judgment till full payment of the judgment sum.

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